proceeded against the first defendant alone. At the hearing in the county Court the evidence established that the plaintiff and the defendants mutually contemplated a joint and several guarantee by the three defendants and also that the plaintiff would neither have given nor would the first defendant have accepted a guarantee to which one director was not a party. The Judge gave judgment for the plaintiff against the first defendant in the sum of £5,522. On appeal by the first defendant, it was held, allowing the appeal, that the contract of guarantee was entered into by the first defendant on the basis that all three co-sureties would be bound by it and that the effect of allowing the plaintiff's claim would be to charge the first defendant with a contract into which he had not entered; that at law there could be no binding contract unless all the anticipated parties became bound and, accordingly, the plaintiff's claim against the first defendant could not succeed.

It is also necessary to distinguish the case cited by learned Counsel for the plaintiff/ respondent namely *Development Bank of Singapore Ltd. v. Yeap Teik Leong & Ors.* [1988] 3 MLJ 443 as in that case although not all the directors had signed the guarantee, they had passed a subsequent resolution to that effect without objecting to the fact that only five directors had been required to give the guarantee.

On these considerations, disregarding the other issues the defendants had raised, my view was that there was a triable issue and I had accordingly allowed the appeal with costs against the learned Senior Assistant Registrar's decision on 21 April 1992 granting summary judgment to the plaintiff.

LEE OUI LONG

v.

LIM CHU AHIAT @ LIM CHENG SIEW & ANOR.

HIGH COURT, MUAR
TUAN RICHARD TALALLA J.
[CIVIL APPEAL NO. 12-17-90]
20 JANUARY 1993

PRACTICE & PROCEDURE: Practice of mentioning on behalf of an opposing solicitor or Counsel - Whether it has legal validity.

On the date appointed for delivery of a judgment in an appeal against the decision of the Sessions Court, Counsel for the respondent addressed the Court stating that he was also "mentioning on behalf of the solicitors of the appellant."

The question which arose was whether this practice of mentioning on behalf of an opposing solicitor or Counsel has legal validity. Counsel for the respondent did not seem to be able to provide any justification or legal basis for such a practice.

Held:
[1] The practice is inappropriate, indeed undesirable. It is a device which has the effect of clogging the hearing lists, especially in the lower Courts where the practice is rampant.

[*Court not recognizing Counsel as "mentioning on behalf of the solicitor for the appellant"].*

Other sources referred to:
Practice Direction No. 6 of 1989

For the appellant - M/s. Zaman & Associates
For the respondent - M/s. Yeo Tan Hoon & Tee

JUDGMENT

Richard Talalla J:
This appeal against the decision of the learned Sessions Court Judge Kluang was heard whereafter judgment was reserved and today was appointed for delivery of the same. When the case was called out Counsel addressed the Court stating that he was appearing for the respondent and also “mentioning on behalf of the solicitors for the appellant”.

He was then asked what was meant by the expression above quoted and informed that as far as the Court could see there appeared to be

no meaning to it inasmuch as the solicitors for the appellant were not parties to the proceedings and therefore there was no question of Counsel appearing on their behalf or mentioning on their behalf. In the latter regard the Court posed the question, "Mentioning what?" To this Counsel replied that Counsel for the appellant was engaged elsewhere and could not appear before the Court in this instance. That answer though typical had no relevance to the question asked. The point seemed to have been missed. As far as I can see Counsel normally appears for a party to the action. Counsel can properly appear at the same time on behalf of the opposing party, provided there is no conflict of interest between the parties, for example when the suit has been compromised and all that remains is to move the Court for judgment by consent. I do not see that Counsel can be seen to be appearing on behalf of a solicitor or Counsel for an opposing party. Even if Counsel can properly so act I do not understand what is meant by Counsel "mentioning" on behalf of the solicitor.

Counsel appeared to be taken by surprise and was somewhat perplexed, understandably so. I in turn assured Counsel that the purpose of the Court was not to embarrass him but to ascertain with a degree of finality whether this practice which has become rife of mentioning on behalf of an opposing solicitor or Counsel has legal validity. Counsel was invited to give consideration to the matter which was stood down in order to enable him to research.

Upon resumption Counsel informed me that he had consulted a number of legal practitioners more senior and experienced than himself all of whom did not seem to be able to provide any justification or legal basis for such a practice.

Counsel then cited Practice Direction No. 6 of 1989 which he considered might be of assistance. It reads as follows:

> Re: Attendance of Counsel and clients on mention dates before the magistrates' courts
>
> The Honourable the Chief Justice of the High Court (Malaya) has directed that counsel and clients in civil actions need not have to attend before the magistrates' courts on mention dates if another counsel has been authorized by them to attend on their behalf.

Magistrates' Courts mention cases on appointed dates, usually to enable Counsel to appear and obtain a hearing date if the matter is to be litigated further or if compromised either to withdraw the action upon agreed terms or enter consent judgment. Invariably there is no conflict of interest between the parties in regard to the business to be transacted when the Court mentions the case. Hence the Practice Direction, which I construe as lending support to the view that Counsel should properly appear on behalf of a litigant and not on behalf of the opposing solicitor or Counsel.

In any event Counsel's office and professional composition is so exclusive and specialised, that it is impossible for another person, albeit qualified, to represent Counsel. Rather it is for Counsel, and it is well within the scope of Counsel's authority in an appropriate case, to request that other person to appear in place of Counsel and upon the request being acceded to that person would appear, not on behalf of requesting Counsel, or on behalf of the solicitor instructing requesting Counsel, but on behalf of the litigant, the client of the instructing solicitor and the lay client of the requesting Counsel. That being the case it behoves substituted Counsel to be fully briefed and ready to fulfil Counsel's duty to the Court as well as to the litigant just as ably as requesting Counsel. Unfortunately, that is often not the case when Counsel appears purporting to mention on behalf of the solicitor or Counsel for the opposing party. Invariably when the Court enquires of pertinent matters, Counsel appearing is unable to provide an effective answer, pleading lack of instructions and emphasising that Counsel is only "mentioning on behalf of the opposing solicitor or Counsel".

It is at its worst on the day of hearing of an action. Counsel for the defendant appears and claims also to be mentioning on behalf of the plaintiff, then seeks an adjournment of the hearing purportedly by consent. The plaintiff is absent. When asked by the Court why the plaintiff is consenting to an adjournment when the plaintiff should ordinarily be seeking the claimed relief as soon as possible, Counsel replies that he does not know, superciliously repeating that he is merely mentioning on behalf of the solicitors for the plaintiff. That is tantamount to there being no appearance on behalf of the plaintiff and consequently the action standing in danger of being struck out, to the peril of the plaintiff and the plaintiff's solicitor. The alternative is a postponement, resulting in delay and adding to the backlog of

cases. In the overall interest of justice the former course is preferable to the latter. The preferred course will place the onus on the accountable party to meet the criteria set out in the case law if restoration of the action to the list is sought. Ordinarily in the circumstances being mulcted in costs should be a relief compared to the tortious aspect.

There is reason to believe that the practice arises by reason of lack of preparation by solicitor on record or Counsel and consequent unreadiness to proceed. The predicament is then sought to be resolved by referring the matter to unwitting Counsel on the other side who, out of goodwill or maybe on the basis of mutual assistance should the latter at some subsequent time find himself to be in a like position of unreadiness, agrees to appear in Court purportedly "to mention on behalf of the former." I take the view that the practice is inappropriate, indeed undesirable. It is a device which has the effect of clogging the hearing lists; especially in the lower Courts where the practice is rampant.

I decline to entertain Counsel as "mentioning on behalf of the solicitor for the appellant". Counsel now declares that he appears for both the appellant and the respondent. I acknowledge and proceed to deliver judgment.

NG CHENG KEE & 2 ORS.

v.

LOH PENG KUNG @ LOH PENG CHIANG & ANOR.

HIGH COURT, ALOR SETAR
DATO' K.C. VOHRAH J.
[CIVIL SUIT NO. 22-33-88]
11 JANUARY 1993

INJUNCTION: Application for mandatory injunction - Whether should be granted - Whether perpetual injunction should be granted.

PRACTICE AND PROCEDURE: Defendants raising defence during trial which was not pleaded in Statement of Defence - Acts of third parties - Whether permissible to rely on this defence.

Tort: Nuisance - Whether caused by wilful or wanton act - Loss of use of land caused by the nuisance - Measure of damages.

The plaintiffs claimed that their padi land could not be cultivated because the defendants or their servants or agents created a nuisance by constructing a new drain on the defendants land, which abutted on the eastern border of the plaintiff's land, and allowing water to flow into and flood the padi land.The second defendant claimed that since there was an existing drain in the defendants' land which exited on to the plaintiffs' land, he instructed a bulldozer driver to clear the drain in order to let water from the depressed area in the defendants' land to flow. He denied that what was constructed on the land was a new drain.The bulldozer driver on the other hand stated that what he made was a new drain and that he connected it to an old drain on the defendants' drain and made the new drain exit onto the plaintiffs' land. His evidence was that water in the old drain could not flow and when he opened the new drain the water flowed along the new drain. He further stated that it was the first defendant who instructed him to make the new drain and for it to exit on to the plaintiffs' land.

Held:

[1] The bulldozer driver (PW4) was a straightforward, honest and independant witness and his evidence was accepted. The new drain was deliberately constructed by PW4 on the instruction of the first defendant and in all the circumstances there was a wanton creation of a nuisance which injured the plaintiffs' land.